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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RAFAEL VALADEZ, Defendant and Appellant.	G036116 (Super. Ct. No. 05WF0023) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gary S. Paer, Judge. Affirmed.

Anita P. Jog, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Scott C. Taylor and Kelley Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Rafael Valadez appeals from the judgment sending him to prison for nine years after a jury found he assaulted his former girlfriend's boyfriend with his truck.[1] (Pen. Code, § 245, subd. (a)(1).) Valadez contends on appeal that the trial court had a sua sponte duty to instruct the jury using CALJIC No. 5.32, "Use of Force in Defense of Another." We affirm.

FACTS

Valadez and Lisa Hill (Lisa) lived together for several months in 2004. They broke up in late spring 2004, and Lisa began dating Ivan Hernandez, a friend and co-worker at Home Depot. There was "bad blood" between Hernandez and Valadez because of Lisa, although it never erupted into a fight.

A few months later, Lisa stopped dating Hernandez, but they continued to talk to each other. A few days after Christmas, Hernandez went to Lisa's house to deliver a Christmas present. She did not answer the door, nor did she answer the phone. He checked the rear of the house and did not see her.

Unbeknownst to Hernandez, Lisa was inside the house talking to Valadez on the phone[2] when Hernandez arrived on the scene. When no one answered either the front or back door, he became frustrated and yelled that he would break the sliding glass door if someone didn't open it. There was still no answer. Returning to the front of the house, he noticed Valadez's truck enter the cul-de-sac. Valadez yelled at Hernandez to leave, to which Hernandez responded "what the heck are you talking about?" Hernandez stood his ground, about seven feet in front of Valadez's truck, when Valadez suddenly accelerated and hit Hernandez. He fell forward, striking his head on the hood of Valadez's truck. Valadez then lifted his shirt to expose a tattoo that read "Lisa," and repeatedly stated, "Get the fuck out of here or I'll kill you." Valadez drove off, as

[1] His sentence included the low-term of two years, doubled pursuant to the Three Strikes law, plus five years for a prior serious felony conviction. (Pen. Code § 667, subds. (a)(1), (c)-(e).)

[2] Lisa was considering reconciling with Valadez, and the pair were discussing marriage and possibly having a child together.

Hernandez struggled to get to his phone to call for help. Valadez returned moments later, continuing to yell at Hernandez to "get out of here." Hernandez got inside his vehicle while Valadez yelled at him. Both were still at the scene when responding officers arrived in answer to a neighbor's call. Valadez was arrested, and Hernandez went to the hospital.

DISCUSSION

Valadez contends the trial court had a sua sponte duty to instruct the jury with CALJIC No. 5.32, which states, "It is lawful for a person who, as a reasonable person, has grounds for believing and does believe that bodily injury is about to be inflicted upon another person, to protect that individual from attack. ¶ In doing so, [he] may use all force and means which that person believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent the injury *which appears to be imminent*." (Italics added.)

A trial court has a sua sponte duty to instruct the jury on an affirmative defense if there is substantial evidence supportive of such a defense. (*People v. Barton* (1995) 12 Cal.4th 186, 195.) Valadez argues there was substantial evidence that he went to Lisa's home for the purpose of protecting her from Hernandez, thus necessitating the instruction sua sponte.

An instruction is mandatory and must be given sua sponte if it involves an issue closely and openly connected with the facts of the case before the court. If the issue is material to a resolution of the case, the criminal defendant is entitled to have the jury decide it, and the court is obligated to inform the jury as to the legal principles involved. (See *People v. Sedeno* (1974) 10 Cal.3d 703, 720.)

To trigger this responsibility, however, the evidence in support of the issue must be sufficient in quantity and quality for a jury composed of reasonable persons to find it to be true. (See *People v. Wickersham* (1982) 32 Cal.3d 307, 324; *People v. Flannel* (1979) 25 Cal.3d 668, 683.) The California Supreme Court addressed the

substantial evidence issue as follows: "Although a trial court should not measure the substantiality of the evidence by undertaking to weigh the credibility of the witnesses, the court need not give the requested instruction where the supporting evidence is minimal and insubstantial." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1145.) In *People v. Strozier* (1993) 20 Cal.App.4th 55, a case also involving CALJIC No. 5.32, the court established "the accused must present 'evidence sufficient to deserve consideration by the jury.'" (*Id.* at p. 63, quoting *People v. Wickersham, supra,* 32 Cal.3d at pp. 324-325.)

The language and rationale of *Barnett* and *Strozier* should likewise apply here. Albeit, the defense attorneys in those two cases actually *requested* the instruction, but the trial court's *refusal* to so instruct was deemed correct. In the case before us, Valadez did not even object to its absence much less request it of the court. Thus, the question turns on whether there was more than "minimal and insubstantial" evidence to support the proposition that Valadez was protecting Lisa from *imminent* harm.

Black's Law Dictionary (8th ed. 2004) defines imminent danger in a criminal context as "[t]he danger resulting from an immediate threatened injury sufficient to cause a reasonable and prudent person to defend himself or herself." Furthermore, "'[t]he circumstances must be sufficient to excite the fears of a reasonable person. . . . [Citation.] Fear of future harm—no matter how great the fear and no matter how great the likelihood of the harm—will not suffice. The defendant's fear must be of *imminent* danger to life or great bodily injury.'" (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082, quoting *In re Christian S.* (1994) 7 Cal.4th 768, 783, original italics.)

Valadez would have the court envision him as a knight in shining armor coming to the rescue of a damsel in distress. However, there was no damsel in distress of *imminent* harm. Unlike Christian in *Christian S.*, Lisa was locked inside her house and not being pursued on foot. Hernandez was *leaving* her residence when he was attacked, whereas Christian was being pursued. (See *In re Christian S., supra,* 7 Cal.4th at p. 772.) Furthermore, there was no evidence that Hernandez was armed. Lisa specifically told

Valadez, “don’t come over,” because she *knew* Hernandez would leave. She stated that she didn’t believe Hernandez would break into the house, and that was why she did not call the police, despite having an opportunity to do so.

The evidence was insufficient to support the interpretation that Valadez was acting to protect Lisa from imminent harm. Thus, the trial court did not err when it failed to instruct with CALJIC No. 5.32 sua sponte. The judgment is affirmed.

SILLS, P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.